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14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**

16 **MATT ALLEN AND 3,552 OTHER**
17 **INDIVIDUALS¹,**

18 Petitioners,

19 vs.

20 **BAMTECH, LLC;**
21 **DISNEY PLATFORM DISTRIBUTION,**
22 **INC. (d/b/a Disney Streaming Services,**
LLC);
ESPN, INC.; and
THE WALT DISNEY COMPANY (d/b/a
Disney Platform Distribution, Inc.).

23 Respondents.

24 **CASE NO.: 2:25-CV-03861**

25 **FIRST AMENDED PETITION TO**
26 **COMPEL ARBITRATION**

27 ¹ A complete list of Petitioners is attached as Exhibit 1 hereto. Due to a scrivener's error, the original
28 Petition in this action incorrectly listed Tommy Allen rather than Matt Allen as a Petitioner, resulting
in the name Tommy Allen incorrectly appearing in the case caption.

1 Pursuant to 9 U.S.C. § 4, Petitioners bring this petition to compel arbitration
2 against BAMTech, LLC (“BAMTech”), Disney Platform Distribution, Inc. (d/b/a
3 Disney Streaming Services, LLC), ESPN, Inc. (“ESPN”), and The Walt Disney
4 Company (d/b/a Disney Platform Distribution, Inc.) (collectively, “Respondents” or
5 “Disney”), as a result of Respondents’ refusal to arbitrate with their customers in
6 accordance with their agreements.

7 **INTRODUCTION**

8 1. Petitioners Matt Allen and the 3,552 other individuals identified in Exhibit
9 hereto (collectively, “Petitioners”) are current or former ESPN+ subscribers who are
10 attempting to arbitrate individual claims against Respondents for their disclosure of
11 Petitioners’ personally identifiable information and video viewing history to unrelated
12 third parties without consent in violation of the Video Privacy Protection Act, 18
13 U.S.C. § 2710 (“VPPA”) and equivalent state laws. Respondents conduct is in clear
14 violation of the VPPA, which broadly prohibits video tape service providers from
15 “knowingly disclos[ing], to any person,” the “personally identifiable information” of
16 “consumers” like Petitioners. 18 U.S.C. § 2710(a)–(b).

17 2. To subscribe to the ESPN+ services, each consumer must agree to the
18 Disney+ and ESPN+ Subscriber Agreement (“ESPN+ SA”), which includes a
19 mandatory binding arbitration clause and class action waiver.

20 3. Petitioners agreed to resolve their disputes through individual arbitration
21 administered by JAMS Mediation, Arbitration and ADR Services (“JAMS”) per the
22 Arbitration Provision in the ESPN+ SA (Updated: September 27, 2022) (“Operative
23 ESPN+ SA”).²

24 4. By its terms, the Operative ESPN+ SA applies to “all disputes and claims
25 between” the user and Respondents “[i]ncluding all related disputes involving The
26 Walt Disney Company or its affiliates” concerning the ESPN+ services “except

28 ² A true and correct copy of the Operative ESPN+ SA is attached hereto as Exhibit 2

1 disputes relating to the ownership or enforcement of intellectual property rights.”
2 Operative ESPN+ SA, ¶ 7.

3 5. The Arbitration Provision has an extremely broad delegation clause under
4 which the arbitrator has “the exclusive authority to resolve any dispute relating to the
5 interpretation, applicability or enforceability of these terms or the formation of this
6 contract, including, without limitation the arbitrability of any dispute, and any claim
7 that all or any part of [the SA] are void or voidable.” *Id.* ¶ 7.

8 6. Further, the Arbitration Provision expressly states that, except for a
9 narrow carve-out for intellectual property disputes, it applies to “all disputes between
10 you and us (**including any related disputes involving The Walt Disney Company**
11 **or its affiliates**).” *Id.* (emphasis added). Accordingly, all Respondents are
12 contractually bound to arbitrate their disputes with Petitioners.

13 7. Petitioners here seek to do exactly what the Operative ESPN+ SA requires
14 them to do and precisely what Respondents have argued for in at least three (3) class
15 actions with substantially similar claims and identical arbitration provisions—have their
16 claims against Respondents decided by a JAMS arbitrator. Unfortunately,
17 Respondents’ actions in response to Petitioners’ claims demonstrate that Respondents
18 have and will continue to refuse arbitration of Petitioners’ claims absent relief of this
19 Court.

20 8. Petitioners now ask this Court to compel arbitration before JAMS under
21 its Streamlined Rules.

PARTIES

23 9. Petitioners are 3,553 ESPN+ subscribers who viewed ESPN+ video
24 content on the ESPN+ platform, thus agreeing to the Operative ESPN+ SA. A list of
25 the email addresses associated with Petitioners' ESPN+ accounts is included in Exhibit
26 1.

1 10. BAMTech, LLC, an indirect subsidiary of The Walt Disney Company, is
2 a Delaware corporation with its principal place of business at 1211 Avenue of the
3 Americas, New York, NY 10036. BAMTech, LLC jointly operates and maintains the
4 ESPN+ services and platform with Disney Platform Distribution, Inc. The ESPN+
5 services include the ESPN+ website, applications, video players and related software,
6 all associated content and related media, and all elements of the ESPN and Disney+
7 services.³

8 11. Disney Platform Distribution, Inc. (d/b/a Disney Streaming Services,
9 LLC), an indirect subsidiary of The Walt Disney Company, is a Delaware Corporation
10 with its principal place of business at 500 S. Buena Vista St., Burbank, California,
11 91521. Disney Platform Distribution, Inc. jointly operates and maintains the Disney+
12 and ESPN+ streaming services with BAMTech, LLC, and offers the “Disney Bundle,”
13 which is a combined subscription package granting access to the ESPN+ and Disney+
14 streaming services.

15 12. ESPN, Inc., an indirect subsidiary of The Walt Disney Company, is a
16 Delaware corporation with its principal place of business at 935 Middle Street, Bristol,
17 CT 06010. ESPN, Inc. is a sports programming and entertainment company that offers
18 the ESPN+ paid subscription service.⁴

19 13. The Walt Disney Company is an American multinational, mass media and
20 entertainment conglomerate that incorporated in Delaware with its principal place of
21 business at 500 S. Buena Vista St., Burbank, California, 91521. The Walt Disney
22 Company’s main business units include divisions in television, broadcasting, streaming
23 media, theme park resorts, consumer products, publishing, and international
24 operations. Through these divisions, The Walt Disney Company’s owns and operates

25 _____
26 ³ See Ex. 2 at 2; Exhibit 3 (a true and correct copy of the amended ESPN+ Subscriber Agreement) at
1-2.

27 ⁴ See Brief in Support of ESPN, Inc.’s Motion to Compel Arbitration and Stay Action, *Swartz v.*
28 *ESPN, Inc.*, No 1:22-cv-01523-KM (M.D. Pa Dec. 12, 2022), ECF No. 13 at 2.

1 direct-to-consumer streaming services including the ESPN and ESPN+ streaming
2 services.

3 **JURISDICTION AND VENUE**

4 14. This Court has jurisdiction over this action under 9 U.S.C. § 4 and 28
5 U.S.C. §§ 1331 and 1367 because the underlying controversy involves claims arising
6 under the laws of the United States.

7 15. This Court has personal jurisdiction over Respondents because they
8 regularly conduct business in California and a substantial part of the harm, events, and
9 conduct giving rise to Petitioners' claims occurred in California.

10 16. Venue is proper in this district under 28 U.S.C. § 1391 because the
11 arbitrations are required to take place in this District and a substantial portion of the
12 events giving rise to the claims occurred here. Venue is also proper in this district
13 under the terms of the operative arbitration agreement, which specifies courts in this
14 District as the venue for adjudicating disputes relating to arbitration.

15 **FACTUAL ALLEGATIONS**

16 A. **The ESPN+ Subscriber Agreement Provides for Mandatory
17 Arbitration.**

18 17. ESPN+ is a subscription video streaming service that offers a wide variety
19 of prerecorded and live on-demand entertainment accessible via the ESPN+ website
20 and ESPN mobile application (collectively, the "ESPN+ Platform").

21 18. Petitioners are ESPN+ users who allege that ESPN+ has improperly
22 transmitted their personally identifying information ("PII"), along with the names of
23 videos they have requested or obtained on the ESPN+ Platform, to numerous third-
24 party advertisers and data brokers without their consent, in violation of the VPPA. As
25 set forth below, Petitioners' claims must be decided in arbitration under the user
26 agreement ESPN+ drafted.

1 19. To access the ESPN+ Platform, Respondents required each Petitioner to
2 agree to the ESPN+ SA, which contains a mandatory arbitration clause and class action
3 waiver.

4 20. Respondents have confirmed that each of the Petitioners in this action has
5 or had an ESPN+ subscription and viewed ESPN+ video content.

6 21. By its terms, the Operative ESPN+ SA governs “all disputes and claims
7 between” the Petitioners and BAMTech, and “related disputes involving The Walt
8 Disney Company or its affiliates,” including ESPN, “except disputes relating to the
9 ownership or enforcement of intellectual property rights.” *See* Ex. 2. ¶ 7.

10 22. “Dispute” is defined to mean “any dispute, action, or other controversy,
11 whether based on past, present, or future events,” between Petitioners and Respondents
12 “concerning the Disney+ Service, ESPN+ Service, or this Agreement, whether in
13 contract, tort, warranty, statute, regulation, or other legal or equitable basis.” *Id.* The
14 “ESPN+ Service” includes “the ESPN+ website, application and associated content
15 and services.” *Id* at Introduction.

16 23. The Operative ESPN+ SA has an extremely broad delegation clause under
17 which the arbitrator has “the exclusive authority to resolve any dispute relating to the
18 interpretation, applicability or enforceability of these terms or the formation of this
19 contract, including, without limitation the arbitrability of any dispute, and any claim
20 that all or any part of [the SA] are void or voidable.” *Id.* ¶ 7. It further specifies that
21 JAMS Streamlined Arbitration Rules & Procedures (“JAMS Rules”) govern
22 arbitrations initiated thereunder. *Id.*

23 24. Consistent with the delegation clause in the Operative ESPN+ SA, the
24 JAMS Rules provide that the arbitrator “shall” decide “[j]urisdictional and arbitrability
25 disputes, including disputes over the formation, existence, validity, interpretation or
26 scope of the agreement under which Arbitration is sought, and who are proper Parties

27
28

1 to the Arbitration.” JAMS, Streamline Rules of Arbitration, Rule 8(b), available at
2 <https://www.jamsadr.com/rules-streamlined-arbitration/#Rule-8>.

3 25. Thus, if the parties dispute the enforceability of the arbitration provision
4 or how that provision should be applied, an arbitration must decide that dispute. *Id.*

5 26. The Operative ESPN+ SA prohibits Petitioners from bringing class
6 proceedings against Respondents and further requires that JAMS administer arbitration
7 under the Streamlined Arbitration Rules and Procedures of JAMS (“Streamlined
8 Rules”). *Id.*

9 27. Under the Streamlined Rules, “[t]he Parties shall be deemed to have made
10 these Rules a part of their Arbitration Agreement (“Agreement”) whenever they have
11 provided for Arbitration by JAMS under its Streamlined Rules or for Arbitration by
12 JAMS without specifying any particular JAMS Rules and the disputes or claims meet
13 the criteria of the first paragraph of this Rule.” *Id.*, Streamlined Rule 1(b).

14 28. Streamlined Rule 26 mandates that each party must pay “its *pro rata* share
15 of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time
16 of the commencement of the Arbitration, unless the parties agree on a different
17 allocation of fees and expenses.” *Id.* at Streamlined Rule 26.

18 29. The Streamlined Rules incorporate JAMS’s Policy on Consumer
19 Arbitrations Pursuant to Pre-Dispute Clauses, which states, in relevant part, “when a
20 consumer initiates arbitration against the company, the only fee required to be paid by
21 the consumer is \$250, which is approximately equivalent to current Court filing fees.
22 All other costs must be borne by the company, including any remaining JAMS Case
23 Management Fee and all professional fees for the arbitrator’s services.” See Exhibit 4
24 (a true and correct copy of the JAMS Consumer Arbitration Minimum Standards
25 Website).

26 30. Therefore, Respondents are obligated to pay their portion of the required
27 filing fees and all other arbitration costs as mandated by JAMS.
28

1 **B. Respondents Materially Breached the Operative ESPN+ SA After**
2 **Thousands of Consumers Filed Arbitrations.**

3 31. Between January 23, 2023, and July 28, 2023, each Petitioner notified
4 Respondents of their intent to commence individual arbitration against Respondents
5 with JAMS as required by the Operative ESPN+ SA. *See Exhibit 5* (Notice letters
6 dated January 23, 2023 and July 28, 2023). Additional Petitioners provided notice of
7 their intent to arbitrate via pre-mediation email, as set forth in Paragraph 6 and Exhibit
8 C of the accompanying Declaration of Jonathan Waisnor.

9 32. The parties entered into a tolling agreement on March 17, 2023 (“Tolling
10 Agreement”) to reserve their rights and agreed to mediate before Judge Jay Gandhi
11 (Ret.) of JAMS on May 2, 2023. *See Exhibit 6* (a true and correct copy of the Tolling
12 Agreement). The Tolling Agreement imposed an effective freeze on the arbitration
13 provision in place at the time of execution, including a provision preventing
14 Respondents from retroactively applying any terms that materially amended, altered or
15 changed Petitioners’ right to arbitrate before JAMS and allowing Petitioners to opt out
16 of any terms amending, modifying, or changing the Operative ESPN+ SA through
17 letter from Petitioners’ counsel:

18 The Parties further agree that the agreement to mediate or failure to pursue
19 a Tolled Claim during the pendency of this Agreement does not constitute
20 an agreement as to the applicable version of the Disney/BAMTech
21 Subscriber Agreement that might apply to the Tolled Claims. Tolling
22 *Defendants will not enforce or retroactively apply any terms that*
23 *materially alter, amend, or change the or impairs the Tolling Claimants’*
24 *right to arbitrate the Tolled Claims in accordance with the*
25 *Disney/BAMTech Subscriber Agreement (updated on September 27,*
26 *2022)*. If this Agreement expires or is terminated by any Party in
27 accordance with Paragraphs One or Three above, *the Tolling Claimants,*
28 *through their counsel Labaton Sucharow LLP⁵, shall have 30 days from*
29 *the Termination Date or expiration of the Tolling Period to in order to*
30 *opt out of any amended terms placed into effect during the Tolling*

⁵ Now Labaton Keller Sucharow LLP.

1 **Period through letter from Tolling Claimants' counsel.** The Tolling
2 Period shall not be included in calculating the opt out period for any
3 amended Terms placed into effect during the pendency of this Agreement.
4

5 *Id.* ¶ 10. (emphasis added).

6 33. On May 2, 2023, the parties attended a mediation with the Hon. Jay
7 Gandhi (Ret.) of JAMS. The mediation did not result in the resolution of any
8 Petitioner's claim.

9 34. Therefore, on June 22, 2023, a group of individuals represented by
10 undersigned counsel including 863 Petitioners (the "JAMS Petitioners") commenced
11 individual arbitrations with JAMS per the Operative ESPN+ SA. *See Exhibit 7* (a true
and correct copy of a representative demand).

12 35. JAMS confirmed the JAMS Petitioners filing on June 27, 2023 and issued
13 an invoice to the JAMS Petitioners for their share of the JAMS filing fees. *See Exhibit*
14 8 (a true and correct copy of the invoice to the JAMS Petitioners).

15 36. On June 28, 2023, the JAMS Petitioners notified JAMS of the parties'
16 agreement to hold off on tendering any filing fees until August 7, 2023, while the parties
17 conferred about the structuring of the JAMS Petitioners' filing. *See Exhibit 9* (a true
18 and correct copy of the June 28, 2023 email to JAMS).

19 37. In response to the JAMS Petitioners' filing, Respondents requested, and
20 the parties later agreed, to engage in a limited bellwether proceeding governed by a
21 separate agreement ("Bellwether Agreement"), executed on August 10, 2023, in which
22 they exchanged information on Petitioners' and other clients represented by
23 undersigned counsel, agreed to conduct limited bellwether proceedings, and agreed to
24 attend a second mediation. *See Exhibit 10* (a true and correct copy of the Bellwether
25 Agreement). The parties also agreed to continue the tolling period for all Petitioners,
26 including the Petitioners who had not yet filed their demands with JAMS, "to and
27 through fourteen (14) days following the conclusion of the Second Mediation." *Id.* ¶
28

1 8. The Bellwether Agreement explicitly prohibited the unilateral termination of the
2 Tolling Agreement before the completion of the second mediation. *Id.*

3 38. On August 25, 2023, the parties engaged in a conference call with JAMS
4 to discuss the agreed upon bellwether procedures and further requested that JAMS stay
5 the remaining claims pending the outcome of the bellwether proceedings and second
6 mediation.

7 39. JAMS subsequently issued an invoice to Respondents for payment to pay
8 the filing fees associated with the ten (10) bellwether proceedings, which Respondents
9 paid on September 6, 2023. *See Exhibit 11* (a true and correct copy of the September
10 6, 2023 invoice).

11 40. The parties submitted their list of ten (10) bellwethers to JAMS on
12 December 4 and 14, 2023 then immediately began arbitrating each case.

13 41. Between December 2023 and August 2024, the parties vigorously
14 arbitrated each of the bellwether cases.

15 42. The Bellwether Agreement also required the parties to exchange
16 information and for Respondents to confirm whether each Petitioner had an ESPN+
17 subscription and watched video content via the ESPN+ platform prior to the Second
18 Mediation.

19 43. Each Petitioner's information was submitted through this process and
20 Respondents confirmed that each Petitioner was an ESPN+ subscriber.

21 44. The parties returned to mediation on September 3, 2024, before Judge Jay
22 C. Gandhi (Ret.) of JAMS. The second mediation was unsuccessful.

23 45. Therefore, on September 6, 2024, Petitioners' counsel contacted
24 Respondents' counsel to confirm that the JAMS Petitioners would continue to be
25 administered according to the rules and policies effective at the time they filed their
26 demands and schedule a time to meet and confer about the approaches for resolving
27 and adjudicating the remaining Petitioners' claims before the expiration of the tolling
28

1 period on September 18, 2024. *See Exhibit 12* (a true and correct copy of Petitioners'
2 September 6, 2024 letter to Respondents).

3 46. During the parties meet and confer conference on September 13, 2024,
4 Respondents refused to engage in any discussions relating to the adjudication of the
5 claims of "any of the [Petitioners] before JAMS," including the JAMS Petitioners'
6 claims filed before JAMS on June 22, 2023. In refusing to arbitrate before JAMS,
7 Respondents argued that they specified a new arbitration provider under the current
8 ESPN+ SA updated on January 25, 2024 ("Amended ESPN+ SA") ADR Services, Inc.
9 ("ADR") or, if ADR is not available to arbitrate, National Arbitration and Mediation
10 ("NAM"). *See Exhibit 13* (a true and correct copy of Respondents' September 13,
11 2024 letter to Petitioners); *see also* Ex. 3 (Amended ESPN+ SA). By refusing to
12 arbitrate before JAMS, Respondents clearly and unmistakably indicated their intention
13 to breach the Operative ESPN+ SA, the Tolling Agreement and the Bellwether
14 Agreement.

15 47. Thereafter, on October 9, 2024, the JAMS Petitioners asked JAMS to lift
16 the August 2023 stay for the remaining JAMS Petitioners and issue a revised invoice
17 to the JAMS Petitioners and Respondents for their applicable portions of the filing fees
18 and initial JAMS fees. *See Exhibit 14* (a true and correct copy of Petitioners' October
19 9, 2024 letter to JAMS).

20 48. In response, on October 10, 2024, Respondents sent a letter to JAMS
21 objecting to JAMS's administration of the case and stating that they would not
22 participate in any JAMS arbitrations of any JAMS Petitioners' claims. *See Exhibit 15*
23 (a true and correct copy of Respondents' October 10, 2024 letter to JAMS).

24 49. On October 17, 2024, all Petitioners opted out of the Amended ESPN+
25 SA, including all amendments and modifications contained therein and all other
26 changes and modifications made to it during the tolling period (*i.e.*, between March 17,
27 2023 and September 18, 2024) through letter from their counsel, Labaton Keller
28

1 Sucharow LLP (“LKS”) before the expiration of the tolling period, as instructed by
2 Section 10 of Tolling Agreement. *See* Exhibit 16 (a true and correct copy of
3 Petitioners’ October 17, 2024 letter to Respondents); *see also* Ex. 10 (Bellwether
4 Agreement).

5 50. The following day, October 18, 2024, the JAMS Petitioners wrote to
6 JAMS in response to Respondents’ October 10, 2024 correspondence. In their
7 response, the JAMS Petitioners pointed out the hypocrisy of Respondents’ claim that
8 JAMS does not have jurisdiction over the claims at issue in the present matter while
9 simultaneously representing to a federal court that it should compel substantially
10 similar claims under the identical Arbitration Provision contained within the Operative
11 ESPN+ SA to arbitration at JAMS. The JAMS Petitioners further clarified several
12 misrepresentations made by Respondents about the provisions of the Tolling
13 Agreement and Bellwether Agreement, none of which empowered Respondents to
14 retroactively enforce terms that materially altered the Operative ESPN+ SA to refuse
15 to participate in arbitrations under the Operative ESPN+ SA. *See* Exhibit 17 (a true
16 and correct copy of the JAMS’ Petitioners’ October 18, 2024 letter to JAMS).

17 51. Respondents notified JAMS on October 21, 2024 that Respondents “will
18 not participate in any further proceedings before JAMS of these purported claims.” *See*
19 Exhibit 18 (a true and correct copy of Respondents’ October 21, 2024 letter to JAMS).

20 52. Subsequently, on November 12, 2024, JAMS declined to administer the
21 remaining JAMS Petitioners’ claims in light of Respondents’ refusal to participate in
22 the proceedings but stated that it would administer the demands “[i]f the parties agree
23 to JAMS or a court orders the parties to proceed here.” *See* Exhibit 19 (a true and
24 correct copy of the JAMS November 12, 2024 letter to the parties).

25 53. By refusing to participate in any proceedings before JAMS, Respondents
26 have anticipatorily breached their agreement to arbitrate with Petitioners under the
27 Operative ESPN+ SA.

1 **C. Issues of the Enforceability, Unconscionability, and Applicability of**
2 **the Amended SLA, or Whether Any Respondents Are Proper Parties**
3 **to the Arbitration, are Delegated to the Arbitrators.**

4 54. Following the second mediation, on September 13, 2024, Respondents
5 notified Petitioners of their refusal to honor the provisions in the parties' Tolling
6 Agreement, namely that Respondents would not retroactively apply any amendments
7 or modifications made to the ESPN+ SA while Petitioners' claims were tolled, or the
8 fourteen day opt-out provision contained in the Bellwether Agreement. *See* Ex. 13.

9 55. Instead, Respondents notified Petitioners of their intent to apply the
10 Amended ESPN+ SA to all Petitioners and refused to proceed with arbitrating the
11 JAMS' Petitioners claims. *Id.* Respondents took this shocking approach despite
12 Petitioners' clear compliance with all pre-arbitration steps in the Operative ESPN+ SA
13 and the provisions of the Tolling Agreement and Bellwether Agreement.

14 56. The Amended ESPN+ SA includes complex procedural requirements
15 transparently designed to prevent any meaningful number of claimants from pursuing
16 claims. *See* Ex. 3 (ESPN+ Amended SA).

17 57. These new provisions entail more detailed pre-dispute notice obligations
18 and mandate that each consumer personally attend and actively participate in an
19 individualized meet-and-confer conference at Respondents' request, even if counsel
20 represents them before the consumer can commence arbitration. *Id.*

21 58. The Amended ESPN+ SA shifts the arbitration administrator from JAMS
22 to ADR Services, Inc. ("ADR") or, if ADR is not available to arbitrate, National
23 Arbitration and Mediation ("NAM"). *Id.*

24 59. The Amended Arbitration Provision also includes an "offer of settlement"
25 provision that allows Respondents to shift all arbitration costs to a consumer if the
26 consumer fails to secure an award greater than Respondents' offer or, at the very least,
27 prevents a prevailing consumer from exercising their statutory rights to attorneys' fees.
28 *Id.*

1 60. Respondents have been on notice of Claimants' claims since 2023 and
2 entered into the Tolling Agreement and Bellwether Agreement while the Operative
3 ESPN+ SA was in effect. The Tolling Agreement explicitly precludes Respondents
4 from enforcing, attempting to "retroactively apply," or impairing the Petitioners' right
5 to arbitrate with JAMS under the Operative ESPN+ SA. The Tolling Agreement
6 further provides a mechanism for opting out of any changes or modifications made
7 during the tolling period.

8 61. By the parties' own agreements, the Amended ESPN+ SA cannot apply
9 to Petitioners because all Petitioners properly opted out of the Amended ESPN+ SA
10 through counsel within 30 days of the expiration of the tolling period pursuant to
11 Section 10 of the Tolling Agreement.

12 62. Regardless, under the Operative ESPN+ SA, all disputes over arbitrability
13 are delegated to the arbitrator. *See* Ex. 2. ¶7 ("You and . . . ESPN+ empower the
14 arbitrator with the exclusive authority to resolve any dispute relating to the
15 interpretation, applicability or enforceability of these terms or the formation of this
16 contract, including, without limitation the arbitrability of any dispute, and any claim
17 that all or any part of this Agreement are void or voidable."). Such delegation
18 provisions are routinely enforced. *See, e.g., Henry Schein, Inc. v. Archer & White
Sales, Inc.*, 586 U.S. 63, 68 (2019) ("When the parties' contract delegates the
19 arbitrability question to an arbitrator, a court may not override the contract. In those
20 circumstances, a court possesses no power to decide the arbitrability issue."); *Rent-A-
Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (citing *Howsam v. Dean Witter
Reynolds, Inc.*, 537 U. S. 79, 83-85 (2002)).

21 63. Further, disputes regarding the Tolling Agreement and Bellwether
22 Agreement also fall within the definition of "dispute" in the Operative ESPN+ SA. *See*
23 Exhibit 2. ¶7 ("You and . . . ESPN+ agree to arbitrate . . . all disputes between you and
24 us . . . that are not resolved informally, except disputes relating to the ownership or

1 enforcement of intellectual property rights.”). This broad provision “clearly and
2 unmistakably” delegates disputes under the Tolling Agreement to the arbitrator.
3 *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016). In fact,
4 Respondents have successfully argued the same position to multiple courts.

5 **D. Respondents Have Successfully Compelled Multiple Class Actions to
6 Arbitration Under Substantially Identical Arbitration Provisions and
7 Continue to Move to Compel Arbitration Under the Same Terms in
Other VPPA Cases.**

8 64. On July 31, 2023, Respondent The Walt Disney Company successfully
9 compelled a putative class action data privacy lawsuit brought in the Northern District
10 of California to arbitration. *See Order Granting Defendant’s Motion to Compel
11 Arbitration, Sadlock v. The Walt Disney Co.*, No. 3:22-cv-01955-EMC (N.D. Cal. July
12 31, 2023), ECF No. 36 (“*Sadlock Order*”). The *Sadlock* plaintiffs asserted claims under
13 the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons.
14 Stat. §§ 57011, arising out of The Walt Disney Company’s purported use of a third
15 party tracking pixel on ESPN.com. The Walt Disney Company successfully moved to
16 stay that action in favor of individual arbitration. There, it successfully argued that
17 agreeing to the ESPN+ SA (Updated September 29, 2021) (“2021 ESPN+ SA”) – the
18 same Operative ESPN+ SA that governs Petitioners’ claims – the plaintiff assented to
19 a binding arbitration provision on the ESPN.com website. *Id.* The Walt Disney
20 Company convinced the court that the Operative ESPN+ SA at issue in this action
21 “clearly and unmistakably” delegates to the arbitrator, not a court, the “exclusive
22 authority” to resolve “any dispute relating to the interpretation, applicability or
23 enforceability of these terms or the formation of this contract, including the arbitrability
24 of any dispute. . . .” *See Motion to Compel Arbitration and Stay Action, Sadlock*, ECF
25 No.18 at 8, 20-22. The *Sadlock* court accepted The Walt Disney Company’s
26 interpretation of these provisions and held that the “gateway issues of arbitrability have
27 been delegated to the arbitrator.” *Sadlock Order* at 26.
28

1 65. Similarly, in *Swartz v. ESPN, Inc.* in the Middle District of Pennsylvania,
2 Respondent ESPN has moved to compel arbitration of substantially similar claims
3 under the identical Arbitration Provision at issue here because the “[a]rbitration
4 Provision specified that proceedings will be administered by JAMS pursuant to the
5 JAMS Streamlined Arbitration Rules & Procedures.” *See* Brief in Support of ESPN,
6 Inc.’s Motion to Compel Arbitration and Stay This Action, *Swartz v. ESPN, Inc.*, No
7 1:22-cv-01523-KM (M.D. Pa Dec. 12, 2022), ECF No. 13 at 2; *see also*, Ex. 2. ¶ 7.
8 Respondent ESPN further argued that the Arbitration Provision requires that the
9 arbitrator, not the court, decides all disputes between the parties including any disputes
10 about whether claims against any particular Disney affiliated entity are within the scope
11 of the arbitration provision. *Id.*

12 66. Finally, consumers in *Antoine v. ESPN Enterprises, Inc.* brought a
13 putative class action against ESPN Enterprises, Inc. (“ESPN Enterprises”) alleging
14 harm to customers based on the same wrongful practices alleged by Petitioners. *See*
15 Complaint, *Antoine v. ESPN Enters., Inc.*, No. 2:23-cv-00887-JLB-NPM (M.D. Fla.
16 Dec. 7, 2023), ECF No. 1. ESPN Enterprises successfully moved to stay that action in
17 favor of individual arbitration. *See* Order, *Antoine*, ECF No. 23 (“*Antoine Order*”).
18 ESPN Enterprises, like the Walt Disney Company, argued in *Antoine* that the same
19 Arbitration Provision at issue in this action “clearly and unmistakably” delegates issues
20 of arbitrability to the arbitrator, including “all questions of applicability, enforceability,
21 and scope.” Motion to Compel Arbitration, *Antoine*, ECF No. 26 at 16. ESPN
22 Enterprises also contended that the Arbitration Provision “incorporate[s] the JAMS
23 rules,” which rules “provide that “[j]urisdictional and arbitrability disputes, including
24 disputes over the formation, existence, validity, interpretation or scope of the
25 agreement under which Arbitration is sought . . . shall be submitted to and ruled on by
26 the Arbitrator.” *Id.* at 18. “Incorporating the JAMS Rules into an agreement constitutes
27 clear and unmistakable evidence of the parties’ intent to delegate questions of
28

¹ arbitrability even if no other delegation language appears elsewhere in the contract.”
² *Id.*

3 67. The court accepted ESPN Enterprises’ argument and ordered the parties
4 to arbitrate their dispute promptly “in accordance with [the Parties’] agreements.”
5 *Antoine* Order at 1. However, the plaintiff in *Antoine* did not promptly initiate
6 arbitration under the terms of the ESPN+ SA that was in place at that time, which called
7 for individual arbitration before JAMS. Instead, on February 14, 2024, eight weeks
8 after the order compelling arbitration and three weeks after the Amended ESPN+ SA
9 was posted, the plaintiff sent ESPN Enterprises a notice of dispute purporting to invoke
10 the Operative ESPN+ SA naming JAMS as the arbitral forum. In response, ESPN
11 Enterprises refused to honor the parties’ prior agreement, instead arguing that the
12 Amended ESPN+ SA applied. The *Antoine* plaintiff returned to court and moved to
13 compel under the prior ESPN+ terms. ESPN Enterprises opposed plaintiff’s motion
14 arguing that arbitration is proper before ADR Services. The motion remains pending
15 before the court.

16 68. Unlike *Antoine*, the Petitioners and the JAMS Petitioners here promptly
17 moved to compel. Further, the Tolling Agreement precluded Respondents from
18 applying any amendments and modifications to the ESPN+ SA during the tolling
19 period and allowed Petitioners to opt out of those amendments and modifications
20 within thirty days of the expiration of the tolling period through written letter from
21 Petitioners' counsel, which Petitioners did.

CLAIM FOR RELIEF

Petition to Compel Arbitration (9 U.S.C. § 4)

24 69. Petitioners incorporate and reallege each preceding paragraph as if fully
25 set forth herein.

26 70. Each Petitioner entered into the Operative ESPN+ SA with Respondents
27 to resolve their claims through binding individual arbitration administered by JAMS.

1 Respondents confirmed that (1) each Petitioner has or had an ESPN+ subscription,
2 thereby agreeing to the Operative ESPN+ SA, and (2) each Petitioner viewed ESPN+
3 video content through the ESPN+ platform.

4 71. The ESPN+ SA contains an arbitration provision covering “any dispute,
5 action, or other controversy, whether based on past, present, or future events,” between
6 Petitioners and Respondents “concerning the Disney+ Service, ESPN+ Service, or this
7 Agreement, whether in contract, tort, warranty, statute, regulation, or other legal or
8 equitable basis.” Ex. 2. ¶ 7.

9 72. The Operative ESPN+ SA designates JAMS as the arbitration
10 administrator. *Id.*

11 73. Under the Federal Arbitration Act, “parties can agree to arbitrate
12 ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to
13 arbitrate or whether their agreement covers a particular controversy.” *Rent-A-Center,*
14 *W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (citing *Howsam v. Dean Witter*
15 *Reynolds, Inc.*, 537 U. S. 79, 83-85 (2002)).

16 74. Respondents have refused to arbitrate with Petitioners under the Operative
17 ESPN+ SA and have also indicated they will refuse to participate in arbitrations before
18 JAMS under the Operative ESPN+ SA.

19 75. Petitioners are “aggrieved by the . . . failure, neglect, or refusal of
20 [Respondents] to arbitrate under a written agreement for arbitration.” 9 U.S.C. § 4. To
21 remedy Respondents’ breach of the Operative ESPN+ SA, Petitioners seek “an order
22 directing that such arbitration proceed in the manner provided for in” the Operative
23 ESPN+ SA. *See id.*

24 76. Because Respondents have refused to pay any arbitration fees for
25 arbitrations filed with JAMS and any future claims filed with JAMS, Respondents have
26 repudiated and breached their contractual obligation to arbitrate in accordance with the
27 terms of the Operative ESPN+ SA.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court:

(a) Compel and order Respondents to arbitrate Petitioners' claims before JAMS, including any defenses to arbitrability or arguments concerning jurisdiction that Respondents may have;

(b) Retain jurisdiction to adjudicate any disputes arising from Respondents' arbitral obligations, including disputes related to fees or discovery, and to adjudicate Petitioners' claims on the merits, if required by Respondents' continued obstruction of the arbitrations;

(c) Award Petitioners' attorneys' fees and costs; and

(d) Grant Petitioners all further relief at law or in equity as may be just and proper.

DATED: July 1, 2025

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